UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

TRACY AUTO, L.P. dba TRACY TOYOTA

Respondent

and **Cases 32-CA-260614**
32-CA-262291
32-RC-260453

MACHINISTS AND MECHANICS LODGE NO. 2182, DISTRICT LODGE 190, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

Charging Party

RESPONDENT'S REPLY TO GENERAL COUNSEL'S RESPONSE TO ORDER TO SHOW CAUSE WHY RESPONDENT'S MOTION TO PRODUCE STATEMENTS/AFFIDAVITS OF WITNESSES SHOULD BE DENIED

Section 102.118(e) of the Board's Rules and Regulations provides for disclosure of pretrial statements and affidavits after a witness called by the General Counsel of by the charging party has testified at a hearing. "If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the Administrative Law Judge must order the statement to be delivered directly to the respondent for examination and use for the purpose of cross-examination." Board Rule 102.118(e)(1).

General Counsel opposes Respondent's Motion to Produce Statements/Affidavits of Witnesses solely based on the timing of the request.[1] Applying a myopic view of the procedural

[1] General Counsel makes no claim that any requested statement contains matter which does not relate to the subject matter of the testimony of the witness. As such, the provisions of Board Rule 102.118(e)(2) are inapplicable, and the entire contents of any responsive witness statements must be produced.

posture of this case, General Counsel argues against production of the witness statements and affidavits based on the incorrect assumption that cross-examination of the witnesses is complete.

General Counsel's argument ignores the reality that this hearing is based on the consolidation of two Unfair Labor Practice Cases—Cases 32-CA-260614 and 32-CA-262291—with an evidentiary hearing on the Regional Director's Decision On Objections, Notice Of Hearing And Order Consolidating Cases For Hearing in Case 32-RC-260453. These separate matters have been consolidated and are being tried together in this hearing, with the General Counsel/Union's case on the unfair labor practice charges proceeding first (only having completed a portion of the General Counsel's case in chief), followed by Respondent's election challenges. As the Administrative Law Judge has expressed repeatedly throughout the testimony of General Counsel witnesses Cesar Caro, Steve Lopez, Tyrome Jackson, and Keven Humeston, Respondent is to avoid adducing repetitive testimony from these witnesses. Thus, Respondent has been given a choice: cross-examine the General Counsel's witnesses on the initial cross-examination immediately following the General Counsel's direct examination, or defer portions of otherwise proper cross-examination to Respondent's examination of the witnesses during its case in chief, where the judge has repeatedly stated that each topic may only be addressed one time so it can be directly after direct testimony or reserving the cross-examination on the topic for Respondent's case on the ULP matters and/or Respondent case on the objections to the election. As the record reflects, Respondent has repeatedly chosen to defer such cross-examination on various topics for later in the proceedings. *See, e.g.,* Transcript of Proceedings at 411:6-418:7.

Considering Respondent's deferral of a number of topics of its cross-examination, General Counsel's argument that cross-examination is complete lacks merit. Moreover, the cases cited in opposition to Respondent's Motion fail to establish that, under the circumstances of the present case, the *Jencks* motion is too late. For instance, in Walsh Lumpkin Wholesale Drug. Co., 129 NLRB 294 (1960), the respondent requested pretrial statements of two witnesses only after they had been fully cross-examined and excused by the trial examiner. Given that the respondent's

counsel "stated that he would not recall the excused witnesses for further cross-examination," the trial examiner properly refused to order the production of the pretrial statements. *Id.* at 295-296. Unlike Walsh Lumpkin, the Respondent in the present case has not completed cross-examination, having specifically reserved portions of its cross-examination to be completed when the witnesses are recalled as adverse witnesses in Respondent's case in chief both on the ULP cases and the election conduct case. As the pretrial statements will be used for purposes of cross-examination, Respondent's Motion properly seeks production under Rule 102.118(e)(1). *See* In re Wal-Mart Stores, Inc., 339 NLRB 64 (use of material disclosed pursuant to *Jencks* motion limited to cross-examination of that witness).

General Counsel's reliance on Pac. Bell Tel. Co. d/b/a SBC California & Communications Workers of Am., Local 9509, AFL-CIO (2005) 344 NLRB 243 (2005) and Raymond Engineering, 286 NLRB 1210 (1987) is similarly misplaced. Both cases, as in the Walsh Lumpkin case discussed above, held that a request for pretrial statements made after the completion of cross-examination was untimely. *See* SBC California, *supra*, 344 NLRB at fn. 3 (request made at close of respondent's case); *see also* Raymond Engineering, 286 NLRB at fn. 7 (request made following General Counsel's redirect examination). Again, since Respondent in the present case has reserved substantial portions of its cross-examination, the *Jencks* Motion is timely.

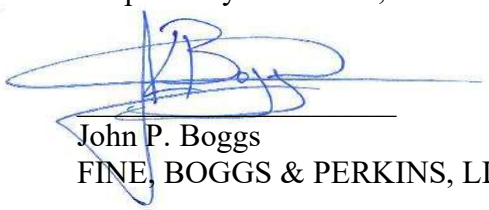
General Counsel cites I-O Services, Inc., 218 NLRB 566 for the proposition that an Administrative Law Judge has discretion to deny a *Jencks* motion made after respondent's counsel was well into his cross-examination of the witness. *Id.* at fn. 1. However, I-O Services fails to provide any details on the timing of the motion or on the standards which the ALJ was to apply in exercising such discretion. Rather, I-O Services noted the lack of prejudice, stating: "Assuming that the Respondent proposed to use the affidavit for purposes of impeachment, we note that the witness' testimony was in many respects merely cumulative and fully corroborated by other witnesses, including witnesses presented by the Respondent." *Id.* In the present case General Counsel has not argued—and there is no basis for such an argument—that impeachment is

unnecessary in this case because the witnesses' "testimony was in many respects merely cumulative and fully corroborated by other witnesses, including witnesses presented by the Respondent." Thus, the I-O Services dicta is of little use.

General Counsel may attempt to argue that, under Fotomat Corp. v. NLRB, 634 F.2d 320 (6th Cir. 1980), an employer may not obtain pretrial statements for impeachment of person called an adverse witness under Rule 611(c) of the Federal Rules of Evidence. Fotomat, 634 F.2d at 326. However, this rule only applies where the witness was not previously called to testify by the government. *See* U.S. v. Burge, 990 F.2d 244, 247 (6th Cir. 1992) ("When the government has used a witness to help establish its case, defense counsel should be given an opportunity to question that witness regarding holes in the testimony given on direct-examination, credibility, and other relevant matters.") Given that General Counsel has called Cesar Caro, Steve Lopez, Tyrome Jackson, and Keven Humeston to testify as a part of the case, Respondent is entitled to production of any pretrial statements made by these witnesses for use in completing Respondent's cross-examination upon recall f the witnesses.

For the foregoing reasons, Respondent's Motion to Produce Statements/Affidavits of Witnesses should be granted, and the General Counsel should be ordered to produce any pretrial statements of Cesar Caro, Steve Lopez, Tyrome Jackson, and Keven Humeston at the time that those witnesses are recalled by Respondents to testify.

Respectfully Submitted,



Dated: December 17, 2020

John P. Boggs
FINE, BOGGS & PERKINS, LLP

CERTIFICATE OF SERVICE

I, Kathryn M. Cherry, hereby declare and state:

1. I am engaged by the law firm of FINE, BOGGS & PERKINS LLP, whose address is 16870 West Bernardo Drive, Suite 360, San Diego, California. My email address is kcherry@employerlawyers.com. I am not a party to the cause, and I am over the age of eighteen years.

2. On December 17, 2020, I caused to be served the following document(s):

RESPONDENT'S REPLY TO GENERAL COUNSEL'S RESPONSE TO ORDER TO SHOW CAUSE WHY RESPONDENT'S MOTION TO PRODUCE STATEMENTS/AFFIDAVITS OF WITNESSES SHOULD BE DENIED

on the interested parties in this action by addressing true copies thereof as follows:

☐ **BY MAIL**: I am readily familiar with the firm's business practice of collection and processing of correspondence for mailing with the United States Postal Service and said correspondence is deposited with the United States Postal Service the same day, postage pre-paid, in a sealed envelope.

☒ **BY ELECTRONIC SERVICE**: by electronically mailing a true and correct copy through Fine, Boggs & Perkins' electronic mail system from kcherry@employerlawyers.com to the email addresses set forth below.

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I certify under penalty of perjury that the above is true and correct. Executed at San Diego, California on December 17, 2020.

*/s/ **Kathryn M. Cherry***

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